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In the Supreme Court of the United States

WALTER S. STEVENSON,
United States Army, Petitioner,

v.

THE UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF OF THE UNITED STATES ARMY DEFENSE APPELLATE DIVISION AS AMICI CURIAE IN SUPPORT OF PETITIONER

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The United States Army Defense Appellate Division respectfully submits this brief as *amici curiae* in support of the petitioner.

INTEREST OF THE AMICI CURIAE

The U.S. Army Defense Appellate Division represents individual soldiers who have been convicted by court-martial and who have been adjudged either a punitive discharge or confinement for one year or more. Defense Appellate Division counsel represent these individuals at the Army Court of Criminal Appeals (ACCA), the Court of Appeals for the Armed Forces (USCAAF), and the Supreme Court of the United States.

SUMMARY OF ARGUMENT

The lower court found that the extraction of the second vial of blood from petitioner was indeed a search, but failed to analyze whether any special needs or circumstances existed to justify such a warrantless search in the absence of probable cause. While ignoring this Court's precedent, the lower court effectively removed any governmental restraints related to bodily physical examinations of servicemembers and military retirees. Furthermore, the lower court's decision encourages physical examinations purported to be for purposes of medical care in cases where probable cause does not exist, and encourages military medical personnel to act as law enforcement investigative tools.

ARGUMENT

Stevenson's petition correctly identifies the legal errors in the opinion of the Court of Appeals for the Armed Forces. The United States Army Defense Appellate Division submits this brief to explain the dramatic implications of the lower court's decision, and how that decision effectively removes any Fourth Amendment protection from active duty servicemembers and military retirees seeking medical attention.

This Court has fashioned a framework for analyzing Fourth Amendment cases. The lower court failed to engage in any Fourth Amendment analysis, but, in upholding the intrusion and extraction of a vial of blood, relied instead on the mere fact that the Navy had jurisdication over Stevenson. The Fourth Amendment demands more.

Fourth Amendment jurisprudence requires that the lower court weigh the intrusion of Stevenson's Fourth Amendment interests against the government's interest in conducting a non-probable cause seizure of Stevenson's blood. A search

must be reasonable, and "whether a particular search meets the reasonableness standard" is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Vernonia School District 47J v. Acton*, 515 U.S. 646, 652-653 (1995) (citing *Skinner v. Railway Labor Executive Association*, 489 U.S. 602, 619 (1989)). When a search is conducted by law enforcement officials for the purposes of a criminal investigation, a warrant is necessary absent "special needs" that make a warrant impracticable. *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987).

No "special needs" exist in Stevenson's case, especially given his status on the temporary disabled retired list (TDRL). Those on the TDRL are subject to physical examinations every eighteen months to ensure that they still suffer from a disability, but they are only forced to return to active duty if the disability ceases to exist and the retiree acquiesces to the return to active duty. Members of the TDRL are not necessary components for executing a military mission. Accordingly, the necessity to take actions to preserve the health of TDRL members is not the same as for active duty servicemembers, who must be in physical condition to engage in combat and other arduous duties. In fact, those on the TDRL have been determined to be unable to meet the physical demands necessary of a servicemember, thus their status on the TDRL.

Because military exigencies do not exist for those on the TDRL, Mil. R. Evid. 312(f) cannot be shown to be a needed exception to generally applicable Fourth Amendment protections. Even if the initial intrusion in Stevenson's case was permissible, the subsequent extraction of an additional vial of blood violated Stevenson's Fourth Amendment rights.

Military Rule of Evidence 312(f) is an exception to the Fourth Amendment. Accordingly, it must be appropriately limited to those areas where there are "special needs, beyond the normal need for law enforcement" *Vernonia School Dist.*

47J v. Acton, 515 U.S. 646, 653 (1995)(citing *Griffin v. Wisconsin*, 483 U.S. 868). *See also Treasury Employees v. Von Raab*, 489 U.S. 656 (1989) (drug tests for United States Custom Service employees seeking transfer or promotion to certain positions); *Skinnner v. Railway Labor Executives Assn.*, 489 U.S. 602 (1989) (drug and alcohol tests for railway employees involved in train accidents or found to be in violation of particular safety regulations), or are conducted for certain administrative purposes without particularized suspicion of misconduct if the searches are appropriately limited. *See, e.g., New York v. Burger*, 482 U.S. 691 (1987) (warrantless administrative inspection of premises of a "closely regulated" business); *Michigan v. Tyler*, 436 U.S. 499 (1978) (administrative inspection of fire damaged premises to determine cause of blaze); *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523 (1967) (administrative inspection to ensure compliance with city housing code).

In Stevenson's case, the subsequent extraction of an additional vial of blood was not for a "special need," nor was it appropriately limited to an extraction of a vial of blood necessary for his medical care. It was a blatant demand by law enforcement officials, who did not have probable cause to seize Stevenson's blood, that medical officials conduct just such a seizure. No connection exists between the medical diabetes screening and the second vial extracted from appellant.

Military Rule of Evidence 313(b) allows non-probable cause extractions of body fluids to ensure "fitness for duty." These medical inspections "are intended to discover, correct, and deter conditions detrimental to military efficiency and safety." *Id.* However, such inspections become searches subject to Fourth Amendment limitations when the investigator's primary motive is criminal prosecution.

United States v. Campbell, 41 M.J. 177, 181 (C.M.A. 1994) (suspicion of criminal activity invalid basis to conduct a urinalysis pursuant to Mil. R. Evid. 313(b)). The criminal evidence and resulting prosecution must be merely "incidental punitive action ancillary to an otherwise justifiable inspection." *United States v. Gardner*, 41 M.J. 189, 192 (C.M.A. 1994). Absent such a justifiable inspection, military courts, before Stevenson's case, required that the criminal investigators show probable cause. *United States v. Patterson*, 39 M.J. 678, 682 (N.M.C.M.R. 1993) (citing *United States v. Ellis*, 24 M.J. 370 (C.M.A. 1987)).

Like the prohibition against subterfuge searches for inspections, Military Rule of Evidence 312(f) prohibits doctors from conducting criminal searches and seizures without probable cause. In *United States v. Nand*, 17 M.J. 936 (A.F.C.M.R. 1984), the Air Force Court of Military Review addressed the admissibility of a urine sample seized during an occupational physical examination. Even though hospital staff used one portion of the urine for the physical and another part for drug testing, the court upheld the search and seizure of urine under Military Rule of Evidence 312(f). *Id.* at 937. It permitted these intrusions because "there [was] no evidence that the commander's order that the sample be given [for a physical] was in any manner a subterfuge to acquire evidence for prosecution." *Id.* The Court of Military Appeals reiterated *Nand's* holding in *United States v. Maxwell*, 38 M.J. 148 (C.M.A. 1993). In *Maxwell*, the use of blood-alcohol evidence was permissible because doctors extracted the patient's blood solely out of concern for his health. *Id.* at 149-50 (citing *United States v. Miller*, 15 C.M.A. 320, 321, 35 C.M.R. 292, 293 (1965)(in a pre-Mil. R. Evid. 312(f) case, blood-alcohol tests are admissible, "if there is no 'nexus' between the doctor and enforcement agents or accused's superiors who may be interested in those results for the purpose of possible prosecution.")(citations omitted)).

CONCLUSION

For the physician's extraction of the second vial of blood to be valid, Mil. R. Evid. 312(f) requires a sufficient nexus between the valid medical purpose and the extraction of blood. No nexus exists between the extraction of the second vial of blood and Stevenson's medical needs. The first vial was all that was necessary to treat Stevenson. The second vial was purely for criminal investigatory purposes. Accordingly, the second vial was a product of an illegal seizure and must be suppressed. The Court should therefore grant the Petition for Certiorari.

Respectfully Submitted,

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